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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

INTERSTATE ROOFING & SUPPLY COMPANY,
Petitioner,
v.
DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, AND RICHARD I. JAMES, AS AND CONSTITUTING THE BOARD OF THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
Respondents.
No. 165

PETITIONER'S REPLY BRIEF

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Petitioner had no factory or place of business in Indiana and the transactions were consummated and paid for in Illinois. The installation in Indiana of materials brought across the State line after they had been purchased from petitioner in Illinois was merely incidental to the whole interstate transaction.

Petitioner contends that, under these facts, interstate commerce exempted the entire transaction from State tax-

ation. The incidental feature of applying the purchased goods cannot convert an interstate transaction into an intrastate transaction.

If it is possible that both interstate and intrastate transactions took place, this Court should be informed that Respondents' elision of a part of the Record on their page two materially understates facts favorable to petitioner. We refer to Respondents' omission of Finding XI (Record p. 27), which discloses petitioner's offer to the State of Indiana to apportion the taxes on the basis of the activities in the respective States. This timely written offer of petitioner preceded by nearly two years any request for information, and even preceded by many months the institution of this suit.

This fact is germane and important because the Court said in an opinion written by Chief Justice Hughes in the *Ingram* case (Indiana) (313 U. S. 252, 255) in overruling the Circuit Court of Appeals:

> "Moreover, if the transportation of the metal parts were regarded as an item of service for which a deduction should have been allowed, we think that it was the duty of respondent, in view of the fact that it was conducting an intrastate business clearly subject to the tax, *to claim the deduction* and show the amount which should be allowed. It does not appear that respondent did either. Respondent made its claim for a total exemption from the tax upon the ground that it was laid upon interstate sales, a contention which it has failed to support."
>
> "The State contends, citing provisions of the taxing act, that the legislature of Indiana contem-

> plated that the taxpayer would reflect in the tax return any deductions claimed, making a separation between taxable and non-taxable items, and that the tax return itself provided a method for claiming any deductions to which the taxpayer thought itself entitled. Respondent insists that the Act did not provide a method of apportionment. In the absence of an *effort* on the part of respondent to present a claim for deduction and to have the state authorities pass upon the question of deduction or *apportionment*, as distinguished from its claim for a total exemption, we are not called upon to attempt to resolve the question of state law."

In commenting on the misapprehension of the Court below, the Court said *id.* p. 254:

> "* * * The court thought that the reasoning of our opinion in *Gwin, White & Prince v. Henneford*, 305 U. S. 434, applied. That case, however, presented a different situation. The business there was that of a marketing agent for a federation of fruit growers and the state tax was measured by the gross receipts of the taxpayer from the business of marketing fruit shipped from the taxing State to the places of sale in other States and foreign countries."

The Court found (*supra*) that all that was done—the service—was "in aid of the shipment and sale of merchandise in that commerce * * * and hence the service was held to be within the protection of the commerce clause." Under "The Nature of the Case," as stated by Respondent's Brief, page 4, we find:

> "* * * Salesmen were sent into Indiana who solicited orders for such work. * * *

> The gross receipts of petitioner from the furnishing and installation [application] of such materials in Indiana upon structures located within said state form the measure of the taxes in controversy here."

A sale was made across the State line, the purchased goods were shipped on the truck of the petitioner to the purchaser in Indiana, immediately applied to his home and the purchase price later sent by him to the company's office in Illinois—clearly an interstate transaction, where the service rendered in Indiana was, to use the Court's words, "in aid of the shipment and sale of merchandise in that commerce." Ergo, the transaction should be free of taxation by the State of Indiana. But, in the event that the Court should not grant refund of the *entire* tax, we call attention to the first portion of the quotation from the Court's decision in the *Ingram* case, and to Finding XI (Record p. 27) showing that the "effort" on the part of petitioner to claim a "deduction or apportionment" was submitted to the Treasury Department in writing, by letter of the petitioner dated January 6, 1940 (more than a year before the starting of the suit), and fifteen months before the decision in the *Ingram* case, in which the State for the first time, so far as we are aware, raised the point that apportionment should have been "claimed." The letter shows, that not only was apportionment "claimed" at that early date, but shows also, that the Department admitted that the transactions "would have been purely interstate commerce" if no work had been done in Indiana, and also suggests that the out-of-Indiana and inside-Indiana activities were approximately equal in amount,

and offering to "pay now on that basis if so assessed (figures to be more definitely determined later, if desired). This segregation of the amounts was suggested tentatively by your field man and would seem to be in accord with the decisions of the court." All the elements required to secure apportionment (lacking in the *Ingram* case) seem to have been anticipated by the Interstate company.

The choice by a State of a particular method of taxation (here a gross income tax) carries with it certain disadvantages as well as advantages. The disadvantages of a gross income tax prevent Indiana from the collection of a tax where the transaction arose and was consummated in Illinois (where most of the activities occurred) and where materials were taken across the State line and paid for in Illinois. Any activities in Indiana *incidental* to the main transaction in Illinois do not deprive the sale of the protection of the commerce clause.

Respondents have ignored the fact that the tangibles involved in the sale to the Indiana householder were transported across the State line by petitioner's own truck and were immediately applied on the home of the buyer, thus meeting every requirement to make the sale exempt from Indiana taxation under the Federal commerce clause.

There has been confusion in Respondents' citation of cases. The decisions applying to one method of taxation do not necessarily apply to another method of taxation merely because they are "tax-cases." The *Berwind-White* case (309 U. S. 33) applying to a buyer's tax under the New York City act can hardly apply to a gross receipts tax act. The only place a buyer's tax could apply (as in

the *Berwind-White* case) is at the location of such buyer. The fact that the *buyer* must pay the tax does *not* (as here sought) compel a *seller* to pay a gross income tax on a transaction in commerce. One kind of a tax cannot borrow, from another kind of a tax, advantages without taking, likewise, the disadvantages. The Indiana gross receipts tax, exacts the tax on transactions within Indiana, but it cannot reach beyond the confines of Indiana and impose the tax upon non-resident's major transactions outside of the State of Indiana. Nor can Indiana, because of minor incidents within the State, drag in the major portion of the out-of-State operations for the purpose of applying its tax to the foreign transaction. The tail should not wag the dog. Indiana could not attach to a gross receipts tax the advantages of a *buyer's* tax whereby she could require non-resident vendors to collect the tax from the citizens of her State as though she had a buyer's tax, and by the same token—not having a buyer's tax (and that is the crux of the *Berwind-White* case) the effort of Indiana to impose, on what is clearly interstate commerce, benefits of the shrewdly drawn New York City tax act, must fail. The activities taxed in the New York City case were *buyer's* activities and Indiana cannot under a gross income, tax *seller's* activities (mostly occurring in Illinois) and which, in Indiana, were merely incidental to the interstate sale (305 U. S. 434, 437).

The Supreme Court of Indiana, as this Court has so frequently said, speaks with final authority on the application of its taxing statute. The Supreme Court of Indiana *has* so spoken on transactions similar to the one in ques-

tion here, in the case of *Department of Treasury v. International Harvester Company* (47 N. E. 2d, 150, 152). Therein the Supreme Court of Indiana said:

> "[7] The appellants would have us construe the statute as exempting only income derived entirely from activities outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above. Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana, and payment was made to branches in other states. There was no showing of a tax evasion. We cannot say that income so received by the appellees was 'derived from sources within the state of Indiana.' Perhaps we should call attention to the fact that § 2 of the Gross Income Tax of 1933 has since been amended. Acts 1937, Ch. 117, § 2, p. 604, § 64-2602, Burns' 1933 (Supp.), § 15982, Baldwin's Supp. 1937."

The transactions had in case at bar were sales outside the State of Indiana, shipments across the Indiana State line, incidental application in Indiana of the product so purchased outside the State of Indiana, and payment therefor also outside the State of Indiana. Petitioner thus did interstate and not intrastate business, reserved by the Federal Constitution for Federal and not State taxation.

CONCLUSION

Petitioner is a resident of Illinois, has no place of business in Indiana, sells its merchandise from Illinois, and sells only merchandise that requires delivery and application. Petitioner makes its own deliveries and application and does not at any time let the merchandise come to rest until after it is taken from the petitioner's truck and immediately applied to the property of the Indiana householder. Payments thereafter are made to petitioner's office in Illinois. It is submitted that this kind of a transaction is definitely interstate and not intrastate business.

May the writ be granted in this case.

Respectfully submitted,

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